

REMARKS

Claims 1-4, 8-10 and 25-37 appear in this application for the Examiner's review and consideration. Of these, claims 3-4 and 8-10 are original, claims 2, 26-33 and 35-37 are previously presented, and claims 1, 9, 25, 29, 34 and 36 are currently amended. Claims 1, 25 and 34 have been amended to correct an informality, while claims 9, 29, 34 and 36 have been amended to recite preferred embodiments of the type of patterns that is provided in the shell. As no new matter is introduced by any of these changes, the entry of these changes and additions is warranted at this time.

Claim Rejections – 35 U.S.C. § 112

Claims 1-10 and 25-37 are rejected under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicants regard as the invention.

Claims 1-10 and 25-37 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicants regards as the invention. Independent claims 1, 25, and 34 have been amended to delete the conflicting language so that it is clear that the entire packaging sleeve is transparent. Applicants respectfully submit that this rejection has been overcome.

Claim Rejections – 35 U.S.C. § 103(a)

Claims 1-4, 8-10, and 25-37 were rejected under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 2,106,893 to Krein ("Krein") in view of EP 0276333 to D'Amato ("D'Amato") and No. EP 0848910 to Kuehl et al. ("Kuehl").

Krein discloses a method for coating a confection by spraying the coating material into a temporary wrapper, placing the confection within the lining, and allowing the confection to harden within the temporary wrapper. Krein uses a paper temporary wrapper, which is strippable from the confection, and contains overlapping, ungummed portions. There is no teaching, suggestion or disclosure in Krein of the use of a packaging sleeve wherein the entire packaging sleeve is transparent and is part of the packaging so as to enable the consumer to view the ice confectionary housed therein, as is required by the present claims. This is confirmed in paragraph 19 of the Rule 132 declaration of Alain Leas (the "Leas declaration") which was previously filed. Such transparent materials, e.g. plastic, were known at the time of Krein's invention, but he expressly excluded them as suitable materials in manufacture of his receptacle,

since his invention was directed to a temporary and economical means of housing a frozen confection with a chocolate covering. In fact, Krein expressly states that an important consideration in choosing the material from which the wrapper is made, is that the material be cheap, as the wrapper is to be discarded at the time the confection is eaten (Page 1, lines 34-38). Paper of course is not transparent so that the consumer does not see the confection until after it is removed. In contrast, the present invention teaches a packaging sleeve wherein the entire packaging sleeve is transparent enabling the consumer to view the shell and ice confection prior to purchase.

Furthermore, the use of writing or a logo (claims 9, 29, 34 and 36) aids in the advertising of the product in a simplified form, in that the writing or logo is in a color that contrasts with that of the shell and is completely visible to the consumer. This avoids the use of advertising inserts or other additional papers or printed materials in the packaged product. This simplification is not possible with Krein. Krein was unconcerned with the physical appearance of the packaging, as his packaging was designed to be stripped away prior to the confection being eaten. Unlike in the present invention, Krein's packaging was not intended to provide the consumer with a preview of the appearance of the product, prior to the wrapper being stripped (Leas declaration, paragraph 19). Further, as acknowledged by the Examiner, Krein is silent with respect to a transparent packaging sleeve, as is required by independent claims 1, 25, and 34 of the present invention.

D'Amato is directed to a cone-shaped plastic container for housing ice cream, and a cover made of the same material, allowing the consumer to view the ice cream package prior to stripping the packaging. D'Amato does not teach or disclose a packaging sheet that corresponds to the desired shape of the outer surface of the shell, and that has an inner surface that is in contact with the outer surface of the shell, as is required by the present claims. D'Amato's ice cream is prepared outside the packaging, and thereafter placed in a plastic foil container, unlike the shell of the present invention which is formed within the support. Thus, the outer surface of the present shell is in complete surface-to-surface contact with the packaging sleeve, thus providing both a smooth appearance of the outer surface and visibility to show the cone and ice confection therein.

In contrast, it is not possible for D'Amato's ice confectionary to be in complete surface-to-surface contact with the internal surface of the packaging sheet, as D'Amato's Figures 2 and 3

show a space between the ice confection and packaging. This is also clear from the translated portions of D'Amato (copy enclosed) that explain that the product is placed into the packaging after it is formed and that the space between the product and package provides cushioning of the product (i.e., "The container serves as a sleeve for the pack of ice-cream ... if necessary prevents the cone shaped ice-cream wafer inside the container from being damaged."). This statement also shows that his product is a wafer cone, and this confirms that there is no way that the shell could have a smooth outer surface and conform exactly to the inner surface transparent plastic sleeve (Leas declaration, paragraph 16). Further, in contrast to the present invention, there is no disclosure in D'Amato that his plastic container could be used for forming the cone. Rather, D'Amato teaches that the prefabricated cone may be *placed* in the plastic packaging (Leas declaration, paragraph 8). Consequently, he cannot achieve a smooth outer surface as the present invention does by forming the chocolate cone on the packaging sleeve.

The Examiner states that a person of ordinary skill in the art would have been motivated to combine Krein and D'Amato, since Krein provides motivation for viewing the ice cream through the wrapper, by teaching an attractive two-toned color effect created by combination of chocolate and ice cream. Applicants respectfully disagree. Krein was focused primarily on minimizing costs when creating his wrapper. He chose to use paper in manufacture of his wrapper, as it was an inexpensive material, not because of any reason to form a smooth outer surface for the shell (Leas declaration, paragraph 19). Krein also was not concerned with the consumer's ability to view the confection prior to removal of the wrapper, because if he were, he would have not chosen to use an wrapper that was not transparent. Instead, Krein's wrapper was designed in a way so as to facilitate easy removal of the wrapper prior to eating the confection (see page 2, lines 27-37). This clearly shows that his intent was for the consumer to view the shell when or while it was being eaten, but not during transport or sale. Krein's mere recognition of the attractiveness of a two-toned effect of combining chocolate and ice cream, again, is only *after* the wrapper is removed (see page 1, lines 50-53).

And while D'Amato is directed to a transparent wrapper to show the ice confection therein, he applies the wrapper after the ice confection is formed in conventional cake or batter cones that are decorated. While his packaging does show the contents, he is also concerned with protection of the product during shipping by having the wrapper provide cushioning. It is not seen how the present combination rejection can be made since Krein is not concerned with

cushioning or with providing visibility to his product prior to removal from the wrapper, and because D'Amato is not forming a shell on the wrapper and provides space between the ice confection and wrapper for cushioning. As the prior art needs to be considered for all that it teaches and not just for selected portions, there is motivation for a skilled artisan to combine Krein with D'Amato to result in the present invention. It appears that the rejection was made using hindsight based on applicants' invention, a procedure that has been criticized by the Court of Appeals for the Federal Circuit in many reported decisions. Claims 9, 29, 34 and 36 are even further removed from the rejection, since they recite the presence of writing or a logo on the shell. As none of these features are disclosed in either reference, there is no way that a person of ordinary skill in the art would be motivated to add such decorative patterns to an ice confection shell as disclosed and claimed in the present invention.

It is respectfully submitted that Krein and D'Amato teach away from each other. As noted above, Krein is not concerned with the appearance of his ice cream product or packaging, and aims to provide an economical alternative to more expensive materials, in the manufacture of an ice cream packaging which is intended to be stripped prior to consumption. By using paper as the wrapper, Krein is not concerned with having a smooth appearance for the outside surface of his cone. And D'Amato does not remedy the deficiencies of Krein because D'Amato discloses a loose fitting plastic container in which his ice cream may be housed. D'Amato's container is intended for holding pre-made ice confections in conventional cones in a manner suitable for transportation without damage, and to keep the ice confection cold for a longer period of time. Ice confections placed in D'Amato's container may already be fully wrapped, and may contain advertising in the form of cardboard wrapping around the ice cream cone. As such, an ordinary-skilled artisan would not be motivated to combine Krein and D'Amato to provide the combined chocolate cone and packaging of the present invention. Accordingly, Applicants respectfully request withdrawal of this rejection.

Kuehl is cited for its teaching of a marbled confectionary coating for ice cream bars. (Examples 1-6). The coating is prepared from a fat-based material such as chocolate, or a water-based material, such as creamy mixes, non-aerated ice cream mixes, sorbets, water ices, or fruit purees. Kuehl teaches that coatings in which one layer consists of either milk or plain chocolate and the other layer consists of white chocolate are the most interesting visually because there may be a marked contrast between the milk or plain chocolate and the white chocolate. The

Examiner cites Kuehl as teaching a “molded chocolate shell intended for holding ice cream.” Applicants respectfully disagree with this characterization of Kuehl. There is no disclosure or suggestion in Kuehl, that his chocolate or water-based coating material is even capable of being formulated into a self-supporting shell. Persons of skill in the art would readily recognize that most chocolates do not possess the requisite rheological characteristics and flow properties to form a shell of consistent thickness and uniformity. While Kuehl’s material is successful in coating ice confections, his disclosure does not teach, suggest or indicate that the coating material could also function as a self-supporting shell. Accordingly, one skilled in the art would not look to Kuehl, which discloses the coating of ice cream upon a transparent packaging sleeve for combination with Krein and D’Amato, to form an ice confection.

Furthermore, Kuehl does not use a transparent packaging sleeve in any embodiment, nor would one be required or necessary according to his disclosure. In one embodiment, Kuehl places strips of chocolate directly into a metal mold and then applies the ice confection therein. It is known that such a process utilizes heating of the metal mold to aid in releasing the frozen confection from it. There is no need for a sleeve material of any type in such a process nor is there any need for it. In an alternative process, Kuehl applies stripes or dots of chocolate upon a previously formed ice confection in the shape of a bar. In either case, it is only after the final ice confection product is formed that it is placed in conventional packaging. Thus, Kuehl does not teach the use of or need for a transparent or other packaging sleeve during initial manufacture of the ice confection, and he certainly does not ever disclose a chocolate shell in complete surface-to-surface contact with a transparent packaging sleeve (Leas declaration, paragraph 7).

Furthermore, as to claims 9, 29, 34 and 36, Kuehl does not disclose any advantages in providing writing or a logo by his process, and at best makes contrasting colors in the form of strips, lines or dots. No combination of the cited art discloses the embodiment of the invention defined by these two claims.

There is no motivation for one of ordinary skill in the art to combine Krein with Kuehl, as the two references teach away from each other. As noted above, Krein was unconcerned with the visual appearance of his shell, as he uses a paper wrapper which renders his cone invisible to the customer prior to unwrapping the packaging. Kuehl, on the other hand, is primarily concerned with the physical appearance of his ice confection before packaging, but like Krein does not disclose any benefits in the use of a transparent packaging in the manufacture, transport

and sale of his ice confection products. Thus, while a skilled artisan might be motivated to apply a visually attractive coating like Kuehl's to Krein's cone, there is no disclosure of using a transparent sleeve for making the confection or for shipping it to highlight and portray the coating prior to removal of the wrapper and consumption of the product.

Accordingly, as none of Krein, Kuehl, or D'Amato teach or suggest a fat-based shell that has its entire surface in a pattern of at least two different colored confections and with the substantially smooth outer surface of the shell in complete surface-to-surface contact with a packaging sleeve, as recited in independent claims 1, 25 and 34, these claims are not obvious over those references. Claims 9, 29, 34 and 36 are further distinguishable due to provision of specific types of contrasting patterns, i.e., writing or a logo, in the shell to further aid in advertising or promotion of the product in a manner that is highly simplified over the art. Thus, all rejections under 35 U.S.C. § 103(a) should be reconsidered and withdrawn.

Claim Rejections – Double Patenting

The claims were provisionally rejected for obviousness type double patenting over the claims of copending applications 10/294,764, 10/385,177, 10/800,222 and 10/984,914. As the provision has not occurred in any of those applications and since the claims of this application are otherwise allowable, these rejections should be withdrawn. To the extent that any of these provisions occurs prior to the allowance of this application, Applicants will submit an appropriate terminal disclaimer to overcome any obviousness type double patenting rejection.

Accordingly, it is believed that the entire application is now in condition for allowance early notice of which would be appreciated. Should the Examiner not agree, then a personal or telephonic interview is respectfully requested to discuss any remaining issues in order to expedite the eventual allowance of this application.

Respectfully submitted,

Date: 1/22/08


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EP 276333 A1

Title: Conical Container

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Publication Date: August 3, 1988

Cone Shaped Container

[Column 1, lines 1–55]

The invention consists of a cone-shaped container which will hold a pack of ice-cream, which consists primarily of a cone-shaped ice-cream wafer with an opening, in which the ice is inserted, and terminated by a conic tip; the container and lids are made out of waterproof material.

A container of this sort is well-known as US-PS 3.170.568. It (the container), as well as the lid, are made out of one piece of manufactured wax impregnated paper, which can be covered if necessary with a layer of plastic. This material is not transparent but waterproof.

In the circle opening of one end of the cone, the lid is fastened by means of a thermo active glue, in order to obtain a hermetic product.

Containers of the described sort are used to transport industrially prefabricated ice-cream to the vendors and to display it for purchase. The container serves as a sleeve for the pack of ice-cream. It keeps dirt away from it and if necessary prevents the cone shaped ice-cream wafer inside the container from being damaged. At the same time, the container forms an insulating envelope for the pack of ice-cream, and when the lid is properly sealed, it keeps the ice-cream cool for a certain time.

For consumption, the lid is taken off and the pack of ice-cream is taken altogether from the container.

Advertisement can be placed on the exterior of the container or on the lid.

The basis of this invention is to improve the container of the kind initially described, while preserving its advantages, by making it more customer friendly both for the purchase and the consumption of the pack of ice-cream.

This task is accomplished in the invention by the presence of at least one target break line on the cone coat between the two ends of the cone along an extent line and by the fact that the material is transparent.

The invention container possesses all the advantages of the preceding well-known container. It forms a sturdy sleeve around the pack of ice-cream, in order for the pack of ice-cream to be optimally protected during its transportation and while stored with the vendor.

When displayed for sale it has the great advantage that the customer can freely view the pack

[Column 2, lines 1–55]

of ice-cream because the container is transparent. The customer cannot be irritated by advertisements on the outside of the container. The customer does not have to be content with only a picture of the pack of ice-cream contained inside, he/she sees the original. He/she can easily determine if he/she wishes to buy and consume the ice-cream contained in the container or not. The pack of ice-cream can have pictures or labels on its outside cover. These can be displayed on a cardboard cover or on the ice-cream wafer. The latter can also have labels and pictures which the customer will see because of the transparent cover of the container. It works particularly well in the invention container, colored or

black and white prints are arranged on the cone-shaped ice waffle. Both the print and coinage are visible from outside and work to impress.

The invention container not only offers advantages for the purchase to the customer but also for the consumption. The customer can separate the container along the cone coat and if desired remove the upper or lower part of the container. In this case, he leave the lower part of the container on the pack of ice-cream. It then serves as a handle and also as a protective layer for the pack of ice-cream. The warmth of the hand holding the container does not transfer quickly to the pack, so that the lower part only begins to melt later on. This is primarily important for children, since they do not eat the ice-cream very quickly and it always happens that the ice which becomes liquid drips. The lower part of the container prevents the ice-cream from rapidly thawing out and the top of the cone of the pack of ice from softening.

The target break line can be pre-inserted/printed in the material. At that location the material is consciously thinner and designed to be less tear proof, in order to make possible the deliberate loosening of the container in that place.

The container can be separated into two along the target break line for example by seizing it with both hands on the left an on the right and by rotating both ends against each other.

Through the torsion resistance of the container against the target break line, the parts of the container can be removed.

The invented container fulfills two contrary objectives.

[Column 3, lines 1-55]

It gives the manufacturer an advantage as it ensures the transportation and availability of the product. The manufacturer can also directly show the pack of ice-cream to the customers.

The customer has the advantage to see exactly what he buys, which makes increased benefits for the consumption for the customer possible.

With further favorable construction of the invention it is intended that the material of the container would consist of a transparent plastic film. The plastic film used to form the container can be rolled in many ways or shirred. If desired it can be of relatively rigid plastic and at the same time of relatively flexible plastic. The stiffness and flexibility will determine the protective quality of the container. It should be able to withstand small shocks and yet be rigid enough in order damage to the pack of ice-cream contained in the container. The stiffness and flexibility also determine the behavior of the container when it is opened. There exists the desire that the material used to make the container is not too rigid in order for the parts of the container not to be removed too easily when the target break line is loosened.

In order to facilitate the release and separation of the container parts, it is possible to plan for a handle above or below the target break line. It can be formed by a protruding edge of plastic film. In addition, with further advances on the invention it is possible to create it out of an independent flap.

The invention container is easily formable by overlapping both sides of the container to form a cone and by fastening the flap with a strip of transparent adhesive.

The transparent adhesive ensures the overlapping connection of both sides without disturbing the view.

The same applies to the attachment of the lid to the oval opening of the container. Transparent adhesive can also be used there to bind the lid to the container.

The container is easily manufactured by creating a triangular shaped cut out, with one of the sides of the triangle being an arc of a circle. The overlapping part ranges approximately from the point of the cone to the base.

A further improvement of the invention would be to

[Column 4, lines 1–31]

create two parallel target break lines laterally on the cone to release a part in form of a tire. The release tire can facilitate seizing a handle. It can be in the overlapping part and look like a protruding tongue connecting the two sides.

In order to open the container more comfortably, a target break line can be arranged at near the lid and parallel to it. If such a target break line was combined with the top of the Cone, then one could remove the top part of the container in one quick streak. The lid close to the target break line can for example be formed by sticking to the cover.

If with further testing of the invention one decides to create another target break line at the center of the cone, then there is the possibility that the upper part of the container can be used as a stand for the pack of ice-cream and the lower pointy part of the container. If one sets the upper container part with the basis to a surface area, then opening the container along the target break line of the pack of ice-cream as well as the lower part of the container can introduce the container and it can be set down.